

Office of  
The City Attorney  
City of San Diego

MEMORANDUM

533-5800

**DATE:** July 28, 2008  
**TO:** Honorable Mayor and City Council  
**FROM:** Mike Aguirre, City Attorney  
**SUBJECT:** Docket Item No. 207: Declaration of Stage 1 Water Emergency

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This memorandum is being provided to you because the 1472 for this item was not routed through the City Attorney's Office. We only learned this item was on the City Council's agenda last Thursday.

By memorandum dated September 21, 2007 (attached), we recommended to the Mayor and City Council that the City of San Diego declare a Stage 2 Water Alert. Our advice was not followed. Instead, the Mayor opted to endorse the San Diego County Water Authority's ("CWA") 20 gallon challenge. That program is not working, as admitted by the Mayor's Report to City Council dated July 15, 2008:

Initial demand figures indicated that City water customers were indeed conserving at the start of the "20 Gallon Challenge." Through January, customers had saved 4,290 acre feet below the average last two years' consumption levels. However, this success was short-lived, as conservation by City water customers since February has decreased to only 106 acre feet below the last two-year average for the same time period. Overall, customers have saved 4,396 acre feet since the beginning of the "20 Gallon Challenge," representing a reduction of 3% over historic levels.

Report to City Council No. 08-114 at p. 2 (emphasis added). Clearly, voluntary conservation measures are insufficient, so declaring a Stage 1 Water Watch as recommended by the Mayor is unlikely to yield any additional water savings. The Mayor and City Council have a legal duty to provide water to City residents. The City Council must adopt a new water conservation ordinance that requires the City to maintain a balance between supply and demand.

The City Attorney urges the Mayor and City Council to take the following actions:

1. The City must revise its emergency water regulations.

On December 28, 2007, our office proposed a new ordinance revamping the City's existing emergency water regulations. Our ordinance would have tied water conservation measures to specific conservation needs. Our ordinance has yet to be considered for adoption. Had it been adopted and its mandatory conservation measures implemented six months ago, the City would be in the position today of needing to purchase less water from CWA at the increased rate due to go into effect next year, thereby saving ratepayer money.

On March 28, 2008, CWA released its model drought response conservation ordinance. CWA asked that all local water agencies adopt the model ordinance to provide consistency in how all its member agencies respond in times of limited water supply. Like the City's existing regulations, the CWA ordinance includes four drought response levels.

Level	Agency	Stage Name	Triggers	Restrictions
1	City	Water Watch	possible shortage	voluntary
	CWA	Drought Watch	10% reduction	voluntary
2	City	Water Alert	probably shortage	mandatory
	CWA	Drought Alert	20% reduction	mandatory
3	City	Water Warning	definite shortage	mandatory
	CWA	Drought Critical	40% reduction	mandatory
4	City	Water Emergency	infrastructure failure	mandatory
	CWA	Drought Emergency	> 40% reduction	mandatory

There are noticeable differences, though, in the triggers for particular response levels. The County Grand Jury criticized the triggers in the City's emergency water regulations, and recommended they be revised. *Water Conservation: Sober Up San Diego, The Water Party is Over*, San Diego County Grand Jury 2007-2008, Recommendation 08-09 at p. 6 (February 13, 2008). The CWA ordinance is preferable insofar as it relies on specific conservation needs, rather than the indeterminate levels such as the "possibility" or "probability" of water shortages in the City's ordinance.

Our office is in the process of merging our proposed ordinance with the model ordinance adopted by CWA, to combine the benefits of both. We will present a new proposed ordinance to the City Council later today. We recommend the City Council consider this new ordinance for adoption at the special City Council meeting on August 12, and then consider adopting a Stage 2 Water Alert under this new ordinance (or a Stage 3 Water Warning under the existing ordinance). Had the Mayor consultant with our office on this item in advance, we would have advised such action earlier.

2. The City must move forward on the pilot project for Indirect Potable Reuse.

At the meeting of the Natural Resources and Culture Committee last Wednesday, the Water Department presented an update on the status of the pilot project for Indirect Potable Reuse ("IPR"). IPR would be a drought-proof enhancement to the City's local water supply, adding millions of gallons of water per day to San Vicente Reservoir. The Mayor has a duty to implement the IPR pilot project pursuant to City Council direction. Revised estimates indicate the project may cost almost \$12 million, for which the Water Department proposes to raise rates pursuant to Proposition 218.

At the request of the Office of the Independent Budget Analyst, this office considered whether the City's past Proposition 218 notices preclude the City from spending any ratepayer funds on the IPR pilot project. They do not. Only the incremental increase in ratepayer funds must be designated for the purposes set forth in the Proposition 218 notice. The City has discretion to use the pre-existing rates for the operation, maintenance and expansion of the water system, including IPR.

Sewer funds are also available to contribute towards the IPR pilot project. A similar study that was canceled by the City Council in 1999, known as the Water Repurification Project, was entirely funded by the Wastewater Department. The City received federal grants towards the construction of the North City Water Reclamation Plant that included specific water reuse goals. To the extent that IPR helps the City meet those goals, use of sewer funds is appropriate.

3. The City needs to adopt a concrete plan to increase the City's locally-controlled water supply.

As we have stated before, the City's water supply is at risk. Up to 90 percent of the City's existing water supply is imported from the Colorado River and the California State Water Project. Both are being threatened, either by global warming or pumping restrictions designed to protect endangered species.

The City must consider all possible ways to enhance our local water supply. IPR is just one component. The City should also look at desalination as another possible source of local water. Increased conservation measures, including tiered rates for multi-family and commercial customers, should also be considered. The City's Urban Water Management Plan, issued in 2005, is due to be updated in 2010. This is an excellent opportunity to incorporate concrete measures to create more water. As the City implements measures to increase its local water supply, the City's ability to issue positive Water Supply Assessments will improve.

4. This item must be heard again at the special meeting of August 12 to cure a deficiency in the noticing procedure.

The California Water Code authorizes the City, as a distributor of a public water supply, to declare a water shortage emergency. Water Code § 350. The City must hold a public hearing prior to declaring a water shortage emergency, unless there is an event damaging the water system that creates an immediate emergency. Water Code § 351; SDMC § 67.3804(b); City

Attorney MOL dated August 14, 1979. Notice of the time and place of the hearing must be published in the City's official newspaper at least seven days prior to the hearing. Water Code § 352. Implementation of conservation measures beyond Stage 1 also requires public announcement and publication in the City's official newspaper for three consecutive days after adoption. SDMC § 67.3807.

It is our understanding that notice of this hearing was not published in the newspaper at least seven days in advance, as required by Water Code section 352. This section states:

Notice of the time and place of the hearing shall be published pursuant to Section 6061 of the Government Code at least seven days prior to the date of the hearing in a newspaper printed, published, and circulated in the area in which the water supply is distributed, or if there is no such newspaper, in any newspaper printed, published, and circulated in the county in which the area is located.

Water Code § 352. This is a matter of such importance to the City, however, that we recommend the matter be heard now, and ratified at the next City Council meeting after notice has been published in the newspaper at least seven days in advance. The public's rights are not significantly compromised by hearing the item today because a Stage 1 Water Watch only requires voluntary conservation measures.

5. The City must notify developers who recently received Water Supply Assessments of the implementation of the emergency water regulations.

Developers who recently received Water Supply Assessments, such as the University Towne Center Revitalization Project and the Ballpark Village Marriott, may need to recirculate or supplement their environmental documents based on this declaration of a Stage 1 Water Watch.

Certain large developments are required to include an analysis of its Water Supply Assessment as part of its CEQA document. Water Code § 10910. If there are any potential deficiencies or uncertainties in the Water Supply Assessment, the CEQA document must identify solutions or alternatives, and analyze their environmental impacts. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova, et. al.*, 40 Cal. 4th 412 (2007). Failure to do so will render the CEQA document susceptible to challenge. A Riverside County Superior Court Judge recently set aside the approval of a 1,400 home development, in part because the Environmental Impact Report failed to sufficiently address shortcomings in the Water Supply Assessment. *Highland Springs Conference and Training Center v. City of Banning*, Riverside Superior Court Case No. RIC 460950 (2008).

Recent Water Supply Assessments did not discuss the possibility of the City implementing its emergency water regulations. Significant new information will trigger the need to recirculate or supplement environmental documents. *Chaparral Greens v. City of Chula Vista*, 50 Cal. App. 4th 1134 (1996); CEQA Guidelines §§ 15088.5(a), 15162(a). Declaration of a Stage 1 Water Watch means that "the possibility exists that the City of San Diego Water Department will not be able to meet all of the water demands of its customers." Municipal Code § 67.3806(b). Such a

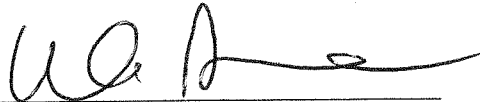
Hon. Mayor and City Council

July 28, 2008

Page 5

declaration likely rises to the level of significant new information and/or a change in circumstance, insofar as it is inconsistent with a Water Supply Assessment's finding that the City has sufficient water to supply new development for the next 20 years. In other words, the City is in a tenuous position if it certifies it has enough water for new development, while simultaneously declaring it may not have enough water for current residents. Developers who recently received Water Supply Assessments will need to evaluate whether to update their environmental documents to account for the declaration of a water shortage.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mike Aguirre', written over a horizontal line.

Mike Aguirre  
City Attorney

Office of  
The City Attorney  
City of San Diego

MEMORANDUM

533-5800

**DATE:** September 21, 2007  
**TO:** Honorable Mayor and City Council  
**FROM:** City Attorney  
**SUBJECT:** Declaration of a Water Shortage Emergency

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According to scientists at the U.S. Geological Survey, the drought currently gripping the West could be the biggest in 500 years, worse even than during the Dust Bowl Years. The Colorado River is at its lowest point on record. About 90% of the water used in San Diego County is imported from other areas of the State.

On August 31, in litigation known as *Natural Resources Defense Council v. Kempthorne*, District Court Judge Wanger announced severe restrictions on the operation of the massive pumps that send water from the Delta to Southern California in order to protect a fish called the Delta Smelt. These restrictions could take effect as soon as this Christmas. About one-third of the water used in San Diego County comes from the Delta.

In light of the historic dry conditions and the impending restrictions on drawing water from the Delta, water supply shortages are probable. While it may take some time for the Metropolitan Water District and the County Water Authority to determine what the actual impact and restrictions will be for the City of San Diego, the City Attorney recommends the City declare a water shortage emergency and implementation of mandatory Stage 2 conservation measures. The City of Long Beach implemented mandatory water conservation measures on September 13, 2007.

Stage 2, known as "Water Alert," is one of four levels of conservation set forth in the Municipal Code. Stage 1 is the least severe, asking only for voluntary conservation measures. Stage 4 is the most severe. Stage 2 is triggered "when the *probability* exists that the City of San Diego Water Utilities Department will not be able to meet all of the water demands of its customers." SDMC § 67.3806(c) (emphasis added). Stage 2 requires mandatory conservation of potable water as follows:

(1) Lawn watering and landscape irrigation, including construction meter irrigation, is permitted only during designated hours on designated days. Watering is permitted at any time if:

- (A) a hand-held hose equipped with a positive shut-off nozzle is used, or
- (B) a hand-held container is used, or
- (C) a drip irrigation system is used.

Commercial nurseries, commercial sod farms and similarly situated establishments are exempt from irrigation restrictions but will be required to curtail all nonessential water use.

(2) The washing of automobiles, trucks, trailers, boats, airplanes and other types of mobile equipment, is permitted at any time with a hand-held bucket or a hand-held hose equipped with a positive shut-off nozzle for quick rinses. Washing may be done at any time on the immediate premises of a commercial car wash or commercial service station, or by a mobile car wash or on-site car wash using high pressure washing equipment. Further, such washings are exempted from these regulations where the health, safety and welfare of the public is contingent upon frequent vehicle cleanings, such as garbage trucks and vehicles to transport food and perishables.

(3) The overfilling of swimming pools, spas, ponds and artificial lakes is prohibited.

(4) Irrigation of golf courses, parks, school grounds and recreation fields is permitted only during designated hours on designated days.

(5) Use of water from fire hydrants shall be limited to fire fighting, related activities or other activities necessary to maintain the health, safety and welfare of the citizens of San Diego.

(6) All restaurants are prohibited from serving water to their customers except when specifically requested by the customers.

(7) Water shall not be used to wash down sidewalks, driveways, parking areas, tennis courts, patios or other paved areas, except to alleviate immediate fire or sanitation hazards.

(8) Ornamental fountains may operate if they recirculate water. Ornamental fountains that do not recycle water are prohibited.

(9) Construction operations receiving water from a construction meter or water truck shall not use water unnecessarily for any purposes other than those required by regulatory agencies. Construction projects requiring watering for new landscaping materials should adhere to the designated irrigation hours associated with subsection (1).

The City must hold a public hearing prior to declaring a water shortage emergency, unless there is an event damaging the water system that creates an immediate emergency. Water Code § 351;

SDMC § 67.3804(b); City Attorney MOL dated August 14, 1979. Notice of the time and place of the hearing must be published in the City's official newspaper at least seven days prior to the hearing. Water Code § 352. Implementation of conservation measures beyond Stage 1 also requires public announcement and publication in the City's official newspaper for three consecutive days after adoption. SDMC § 67.3807.

There is a sufficient basis to declare a water shortage emergency and implement Stage 2 conservation measures. A water shortage emergency may be declared for threatened shortages that have yet to occur. *San Diego County Water Authority v. Metropolitan Water District of Southern California*, 117 Cal. App. 4th 13 (2004). Judge Wanger's ruling in *Natural Resources Defense Council v. Kempthorne* severely restricts the operation of pumps that send water from the State Water Project to Southern California, upon which San Diego County relies on for about a third of its water. Though Judge Wanger's ruling regarding the Delta Smelt and the State Water Project may not yet be final or implemented, the threat his ruling poses to the City's water supply, in combination with the current drought conditions, is enough to declare a water shortage emergency. The City's 2005 Urban Water Management Plan suggests a threshold of a 10% water supply shortage for Stage 2 conservation measures; a threshold we understand will likely be met.

The City Attorney recommends the City Council immediately docket an action to declare a water shortage emergency and implement mandatory Stage 2 conservation measures. The declaration of a water shortage emergency may be done by resolution, as has been done in the past. *See* Resolution No. R-276361. The resolution is subject to the Mayor's veto power.